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IN THE

Supreme Court of the United States

October Term, 1959.

No. 878

THRAVES LOCKETT ANDERSON,
Appellant,

v.

THORINGTON CONSTRUCTION COMPANY, INCORPORATED,
Appellee.

On Appeal From the Supreme Court of Appeals of Virginia.

JURISDICTIONAL STATEMENT.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1959.

No.

THRAVES LOCKETT ANDERSON,

Appellant

v.

THORINGTON CONSTRUCTION COMPANY, INCORPORATED,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF APPEALS OF VIRGINIA.

JURISDICTIONAL STATEMENT.

Appellant appeals from the final judgment of the Supreme Court of Appeals of Virginia, entered October 12, 1959, affirming the judgment of the Law and Equity Court of the City of Richmond sustaining appellee's plea that appellant's common law action be dismissed and that his claim is within the exclusive jurisdiction of the Industrial Commission of Virginia. Appellant submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINION BELOW.

The opinion of the Supreme Court of Appeals of Virginia is reported at 201 Virginia 266, 110 S. E. 2d 396 (1959). The opinion of the Law and Equity Court of the City of Richmond is not reported. Copies of the opinion and order of the Law and Equity Court of the City of Richmond, the opinion of the Supreme Court of Appeals of Virginia, the judgment of the Supreme Court of Appeals of Virginia and its order denying appellant's petition for a rehearing thereon are attached hereto as Appendix "B".

JURISDICTION.

Plaintiff-appellant ("appellant") originally brought a common law action to recover damages for personal injuries he sustained as a result of defendant-appellee's ("appellee") negligence. Suit was commenced in the Law and Equity Court of the City of Richmond and was dismissed by that court on grounds that appellant's exclusive remedy was under the Virginia Workmen's Compensation Law. The judgment of [illegible] was appealed to the Supreme Court of Appeals of Virginia.

The judgment of affirmance of the Supreme Court of Appeals of Virginia was entered on October 12, 1959. On October 20, 1959, appellant filed notice of his intention to apply for rehearing on said judgment. On November 12, 1959, appellant filed his petition for a rehearing on said judgment, and on November 30, 1959, the Supreme Court of Appeals of Virginia entered an order denying said petition. On February 24, 1960, Notice of Appeal herein was filed in the Supreme Court of Appeals of Virginia.

The present appeal is for a judgment here that § 65-26 of the Virginia Workmen's Compensation Law as construed below is a violation of the due process and equal protection clauses of the Fourteenth Amendment to the Federal Constitution. The jurisdiction of the Supreme Court to hear this appeal rests upon 28 U. S. C. § 1257(2). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on appeal in this case:

Dahnke-Walker Milling Co. v. Bondurant, 257 U. S. 282, 42 S. Ct. 106 (1921);

Brinkerhoff-Faris Trust Co. v. Hill, 281 U. S. 673, 50 S. Ct. 451 (1930);

Great Northern Ry. Co. v. Sunburst Oil & Refining Co., 287 U. S. 358, 53 S. Ct. 145 (1932);

Ohio ex rel. Bryant v. Akron Metropolitan Park District, 281 U. S. 74, 50 S. Ct. 228 (1930);

Missouri ex rel. Missouri Ins. Co. v. Gehner, 281 U. S. 313, 50 S. Ct. 326 (1930);
Saunders v. Shaw, 244 U. S. 317, 37 S. Ct. 638 (1917);
Herndon v. State of Georgia, 295 U. S. 441, 55 S. Ct. 794 (1935).

STATUTES INVOLVED.

Amendment XIV, Section 1 of the Constitution of the United States; and the following pertinent sections of the 1950 Code of Virginia: 65-5, 65-26, 65-27, 65-28, 65-30, 65-31, 65-37, 65-38, 65-99, are set forth in Appendix "A" hereto.

QUESTIONS PRESENTED.

The Supreme Court of Appeals of Virginia has construed the Virginia Workmen's Compensation Act as barring appellant, an employee of an independent contractor, from bringing any common law action for redress of personal injuries sustained as a result of the tort of a separate independent contractor, appellee. In addition to being thus immune from common law liability, appellee is not liable for appellant's injuries either actually or contingently under said Workmen's Compensation Act.

1. Does the Virginia Workmen's Compensation Act, as so construed, deprive appellant of his property without due process of law in violation of Amendment XIV, Section 1 of the Constitution of the United States?

2. Does the Virginia Workmen's Compensation Act, as so construed, deny appellant the equal protection of the laws in violation of Amendment XIV, Section 1 of the Constitution of the United States?

STATEMENT.

1. The Facts.

The accident in suit occurred on March 12, 1957 (R. 2; R. 22).[1] At the time, appellant was an actual employee of Parsons, Brinckerhoff, Hall and MacDonald ("Parsons"), and he was injured while working within the scope of his employment with them (R. 22). He received workmen's compensation for his injuries from Parsons' workmen's compensation carrier (R. 22), Parsons having fully complied with the Virginia Workmen's Compensation Act (R. 23).

Pursuant to contract, Parsons had for some time been acting as consulting engineers for the Richmond-Petersburg Turnpike Authority ("Authority")[2] Parsons' contractual obligation to the Authority was to render it consulting engineering services in three stages: (1) a preliminary stage involving location of the turnpike, *inter alia;* (2) preparation of contracts, plans and specifications for the construction work; and (3) services in connection with supervising the construction of the turnpike (R. 6). The accident in suit happened during the third stage of the contract between Parsons and the Authority (R. 6).

Although Parsons prepared plans and specifications for work to be done in the construction of the turnpike, the Authority let the contracts for the construction. Parsons was not a party to those construction contracts (R. 30).

Among the contracts the Authority let was one to appellee on December 12, 1956 (R. 30). This was one of some seventeen contracts which were advertised and awarded to lowest bidders for the construction of the turn-

1. All subsequent parenthetical references are to printed Record No. 4980 in the Supreme Court of Appeals of Virginia as paginated therein.

2. The Authority had been created by an Act of the General Assembly of 1954 (Chap. 705, Acts of 1954 p. 920) Va. Code Sections 33-255.24 through 33-255.44 (R. 5).

pike (R. 34). Appellee thus had a contract with the Authority to construct a portion of the turnpike (R. 34). Each of the seventeen contracts was made between the bidding contractor and the Authority itself (R. 34).

The Authority had no work force of its own with which it could do the necessary construction work on the turnpike. All of it was let to contractors (R. 35).

Parsons selected its own employees to carry out its consulting work for the Authority (R. 38). Parsons' employees were all on Parsons' payroll and not the Authority's (R. 37). Appellee selected its own employees to carry out its contract with the Authority (R. 38), and they were paid by appellee, not the Authority (R. 39). They were also under appellee's direction and control (R. 42). Appellee, the Authority and Parsons each carried workmen's compensation for its own employees (R. 38). Appellant was not on appellee's payroll *and its workmen's compensation policy did not cover him* (R. 43).

The Authority did not in any way direct or control the manner in which Parsons was to perform its work as professional engineers. Parsons was left to exercise its best professional judgment to see that the work was performed in accordance with plans and specifications (R. 44). Parsons in turn did not tell appellee how to do appellee's work, Parsons' only objective being to see that appellee complied with plans and specifications (R. 46).

At the time appellant was injured, he was an inspector employed by Parsons (R. 47). His job duties were to supervise the construction of driving piles, and to record the blows in order to calculate lineal feet and the bearing on each piling (R. 47). He did not in any way control appellee in the matter of the employees it should have on the job or the manner in which they should do the work. Appellant's sole interest was to assure compliance with specifications (R. 47).

Appellant's common law action was founded on appellee's negligence in the type of equipment it used and the

manner in which its pile driving work was performed (R. 2-3).

2. Proceedings Below.

On August 7, 1957, appellant filed his common law action against appellee in the Law and Equity Court of the City of Richmond, seeking damages for personal injuries he sustained on March 12, 1957 (R. 2-3). On August 22, 1957, appellee filed a special plea for an adjudication precluding appellant's common law action on the grounds that appellant's sole remedy was under the Workmen's Compensation Statutes of Virginia (R. 4-5). Thereafter the Law and Equity Court of the City of Richmond took testimony (R. 22-49), and on July 16, 1958 that court entered an order sustaining the special plea and dismissing appellant's action (R. 21).

On August 14, 1958 (R. 22) appellant filed notice of appeal in the Supreme Court of Appeals of Virginia from said final judgment. In an opinion and judgment filed October 12, 1959, the Supreme Court of Appeals of Virginia affirmed the judgment below. On October 20, 1959, appellant filed notice of intention to apply for rehearing. On November 12, 1959, appellant petitioned said Supreme Court of Appeals for a rehearing on its judgment of October 12, 1959. On November 30, 1959, said petition was denied by order of that court.

3. How the Federal Question Is Presented.

As earlier indicated, the Supreme Court of Appeals promulgated an opinion and judgment of affirmance precluding appellant's common law action against appellee and limiting his remedy for the injuries in suit to the Virginia Workmen's Compensation Act.

The interpretation and construction which that opinion gave to those portions of the Virginia Workmen's Compensation Act involved herein, and the effect of the result-

ing judgment, were all such as to compel in appellant a respectful, settled conviction that, as construed, § 65-26 of the Virginia Workmen's Compensation Act was necessarily violative of the due process and equal protection clauses of the Fourteenth Amendment (as well as of the Virginia constitution). The holding below was unprecedented in Virginia law, and certainly could not have been reasonably anticipated from prior decisions of the Supreme Court of Appeals of Virginia. This is the first occasion in Virginia law where a party in appellee's status has been given the equivalent of absolute immunity from liability under either the common law or workmen's compensation. That conclusion was reached by, in effect, a reversal of a settled body of Virginia law.

Accordingly, on October 20, 1959, appellant timely filed notice of his intention to apply for a rehearing, and on November 12, 1959 appellant timely filed his petition in that court for a rehearing on said judgment. In his petition, which appears in the transcript of the record now on file in this Court, appellant specifically raised and extensively briefed the question of whether the Virginia Workmen's Compensation Act as construed by the Supreme Court of Appeals of Virginia to deprive appellant of his common law action against appellee, was not violative of the due process and equal protection clauses of the Fourteenth Amendment. Those are precisely the questions on which review is now sought here.

Having taken said petition for a rehearing under advisement, the Supreme Court of Appeals denied it in an order entered on November 30, 1959. This order is made a part of the transcript of the record below presently on file in this Court.

It is respectfully submitted that in these circumstances, which have been honored by this Court in the cases cited under "Jurisdiction," *supra*, the federal question was timely raised and will support the exercise of jurisdiction by this Court.

Having thus timely drawn in question the validity of the Virginia Workmen's Compensation Act on the ground of its repugnancy to the Fourteenth Amendment, and having received a decision necessarily sustaining the validity of the statute by denial of said petition, we further respectfully submit that jurisdiction in this Court exists under 28 U. S. C., Section 1257(2).

THE QUESTIONS ARE SUBSTANTIAL.

The virtual universality of workmen's compensation statutes renders the present question of great public importance.

The construction the court below gave to the Virginia Workmen's Compensation Act deprived appellant of his right to maintain an action at law for damages resulting from appellee's negligence. It is equally clear under Virginia law that appellee has neither contingent nor actual workmen's compensation liability for appellant's injuries. As a result, appellant has suffered a deprivation of his property without due process of law, and a denial of the equal protection of the law, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

I. The Act Violates the Due Process Clause of the 14th Amendment.

The design of the Virginia Workmen's Compensation Law is readily discerned:

(1) As against his immediate employer, appellant is given a right to stated compensation benefits from the employer in substitution for the common law remedies he would have had absent the compensation law.

(2) As against an "owner"[3] in whose business appellant's employer is engaged, appellant relinquishes his right

3. Sec. 65-26 of the 1950 Code of Va.

to sue such an "owner" for negligence at law in return for a secondary liability imposed on the owner to respond in workmen's compensation in the event his immediate employer fails to satisfy his primary compensation liability.

(3) As against "third parties", the Act worked no change in rights until the decision below. If a third party negligently injured one in appellant's position, the injured workman retained his right to sue at law for damages, and he had no right to compensation payments from the third party tortfeasor.

(4) With the promulgation of the surprising and unprecedented decision below, there now exists a striking exception to third party liability: if the negligent third party is engaged with the injured person in the business or trade or occupation of an "owner", the injured person is deprived of an action at law against the third party. For such immunity from a suit at law, the negligent third party gives literally nothing in return, not even an exposure to secondary liability to pay compensation which an owner in a similar situation must give.

Here, Parsons and Thorington were found to be independent contractors with and under the "owner"—Turnpike Authority. Thus, it has now been held that an employee of one independent contractor injured on the job by the negligence of an employee of another independent contractor has no remedy in compensation *or* at common law for damages against the person negligently injuring him, or against such person's master, so long as the two independent contractors are found to be engaged in the trade, business or occupation of a common "owner".

Section 1 of the Fourteenth Amendment provides in pertinent part as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which

shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

In *Gibbes v. Zimmerman*, 290 U. S. 326, 54 S. Ct. 140 (1933) and cases cited therein, this Court declared a cause of action to be a property right for which a remedy must be afforded. Although the Fourteenth Amendment does not guarantee any particular form of remedy, it does guarantee "... the preservation of his substantial right to redress by some effective procedure" (per Mr. Justice Roberts at 54 S. Ct. 142).

See also *Terracciona v. Muray*, 53 N. J. Super. 557, 148 A. 2d 68 (1959) and cases cited therein.

Appellant readily concedes that, in a constitutional sense, his property right herein is not specifically a right to maintain a common law action in tort against appellee, but he insists that he does have a constitutional right to "some effective procedure" for redress. As the Virginia statute has now been construed on these facts, he is completely without *any* remedy against the party who caused his injury. This is the constitutional wrong appellant prays this Court to right.

Economic life being what it is, the apparent certainty of his immediate employer's primary responsibility and Turnpike's secondary responsibility could be dissipated by financial embarrassment or bankruptcy. In that event, the obvious party to whom he should be able to look is the tort-feasor who injured him. But that wrongdoer is not liable at common law by virtue of the decision below nor does he bear *any* contingent or secondary compensation liability under the Virginia statute. In short, appellant is stripped of a valuable property right in exchange for literally nothing. He bears his loss alone since the substantial right to

redress in some form has been taken from him. In vivid contrast, appellee enjoys an absolutely privileged sanctuary from any liability.

Should a first reading of the Virginia Workmen's Compensation Act leave any doubt that in these circumstances appellant has no remedy thereunder against appellee, the decisional law destroys that doubt. See, for example, *Kramer v. Kramer*, 199 Va. 409, 100 S. E. 2d 37 (1957) and *Buschow v. Anthony Izzo Company, Inc.*, 266 F. 2d 695 (C. A. D. C., 1959). Those cases clearly hold that only the immediate employer is liable for compensation. Appellee is not.

Faced with a realization that appellee was not liable in compensation to the appellant, the court below need not have so interpreted the Compensation Act as to bar a common law suit in tort. That it did so was surprising and without precedent. Other courts have faced a similar problem under similar compensation statutes with markedly different results. See, for example, *Benoit v. Hunt Tool Co.*, 219 La. 380, 53 So. 2d 137 (1951); *Brown et al. v. Arrington Construction Co.*, 74 Idaho 338, 262 P. 2d 789 (1953); *Cermak v. Milwaukee Air Power Pump Co.*, 192 Wisc. 44, 211 N. W. 354 (1926); *Olsen v. Sharpe et al.*, 191 Tenn. 503, 235 S. W. 2d 11 (1950) (where the specific statute involved was strikingly similar to § 65-37 of the Virginia Workmen's Compensation Act); and *McCourtie v. U. S. Steel Corporation*, 253 Minn. 501, 93 N. W. 2d 552 (1958).

We are most cognizant that the construction (as contradistinct from the federal constitutional effect of the construction) the court below gave the Virginia Workmen's Compensation Act cannot be the subject of an appeal (or certiorari) here, but the cases just cited are not offered for that purpose. They are, on the contrary, cited to demonstrate that what was done to the statute below represents an unanticipated departure from the traditional construction given statutes controlling facts such as these.

The result below created not only an unexpected conflict with these authorities in other jurisdictions, but it was also an unanticipated rejection of Virginia authority as well. We believe it has the unannounced effect of overruling *Kramer v. Kramer*, 199 Va. 409, 100 S. E. 2d 37 (1957). We believe further that (1) when the enabling legislation creating the Turnpike Authority specifically provides that it is "... a political sub-division of the Commonwealth ..." (Code of Virginia, § 33-255.27) and (2) when all Virginia cases until now have consistently excluded political subdivisions from workmen's compensation liability to an employee of an independent contractor engaged in the subdivision's trade, business or occupation, *Bamber v. Norfolk*, 138 Va. 26, 121 S. E. 564 (1924); *Portsmouth v. Daniels*, 157 Va. 614, 162 S. E. 324 (1932); *Board of Supervisors of Amherst County v. Boaz*, 176 Va. 126, 10 S. E. 2d 498 (1940), that no one reasonably could have foreseen or indeed expected that the court below would cast these authorities aside to bring § 65-26 into effect here. Indeed, the court below not only departed radically from these authorities but from the settled view of the Industrial Commission of Virginia, which administers the Act. It has consistently held and has stated in an annotation to § 65-26 of the Act prepared by the Commission:

> "'*Application to state or political sub-division thereof.* This Section makes no mention of the State, its political sub-divisions or municipal corporations *and is not applicable to them* ...'" (Emphasis supplied.)

Finally, the rule laid down in *Sears Roebuck & Co. v. Wallace*, 172 F. 2d 802 (C. A. 4, 1949), which was applicable and was cited to the court below, was effectively and unexpectedly rejected in the result below.

These are precisely the circumstances which justify the exercise of jurisdiction here. See the cases cited in "Jurisdiction", *supra*. We submit that in achieving the result below, the lower court destroyed appellant's valuable property right while refusing to give him a right to redress against appellee "by some effective procedure". In doing so the court below also rendered § 65-26 in violation of the due process clause of the Fourteenth Amendment.

II. The Act Violates the Equal Protection Clause of the 14th Amendment.

In imposing the construction it has, the court below has so interpreted the Act as to effect an unreasonable classification in denying the equal protection of the law guaranteed by the federal Constitution.

It is a well-recognized principle of constitutional law that any classification must be reasonable and non-discriminatory. *Louisville Gas & Electric Co. v. Coleman*, 277 U. S. 32, 48 S. Ct. 423 (1928).

In *DeMonaco v. Renton*, 18 N. J. 352, 113 A. 2d 782 (1955) the court found unconstitutional that section of the New Jersey Workmen's Compensation Act which excluded coverage of the Act for newsboys. Chief Justice Vanderbilt held at 113 A. 2d 782:

> "Although the Legislature has broad discretion in selecting those who shall be affected by its enactments, such selection must be reasonable and include all those who naturally fall within the class. The classification must be nondiscriminatory and bear a reasonable relationship to the general object of the legislation:
>
> > ". . . It is essential that the classification itself be reasonable and not arbitrary, and be based upon material and substantial distinctions and differences reasonably related to the subject matter of the legislation. . . . [N]o person or class shall be denied the protection of the laws enjoyed by

> other persons or classes of persons under similar conditions . . . both as respects privileges conferred and burdens imposed.'
>
> Washington National Insurance Co. v. Board of Review, 1 N. J. 545, 553, 64 A. 2d 443, 447 (1949)."

See also *Truax v. Corrigan*, 257 U. S. 312, 42 S. Ct. 124 (1927) and cases cited therein.

To the extent that the Act and its judicial interpretation affect the appellant, a constitutional violation inheres in the different treatment the Virginia law accords appellee and other tortfeasors who happen not to be engaged in the "trade, business or occupation" of an owner. Put another way, there is an unreasonable classification of injured employees who are shorn of, or permitted to retain, their common law right to an action in tort against the party negligently causing their injuries, depending upon whether or not the negligent third party is held to have some connection with the work of an "owner" for whom both are working. There is no basis in reason for such a classification.

The Supreme Court of Illinois treated the problem of classification under a workmen's compensation act in *Grasse v. Dealer's Transport Co.*, 412 Ill. 179, 106 N. E. 2d 124 (1952). The particular portion of the Illinois statute whose constitutionality was questioned provided as follows:

> "Where an injury or death for which compensation is payable by the employer under this Act was not proximately caused by the negligence of the employer or his employees, and was caused under circumstances creating a legal liability for damages in some person other than the employer to pay damages, such other person having also elected to be bound by this Act, or being bound thereby under section three (3) of this Act, then the right of the employee or personal representative to recover against such other person shall be

> transferred to his employer and such employer may bring legal proceedings against such other person to recover the damages sustained, in an amount not exceeding the aggregate amount of compensation payable under this Act, by reason of the injury or death of such employee."

In substance, the Illinois Workmen's Compensation Act permitted an injured employee to sue in tort for an injury negligently inflicted by a third party who did not come under the compensation act, but denied him the right to bring such an action if the negligent third party had elected to come under that act.

The *Grasse* court concluded that the statute effected classifications among employees, employers and tortfeasors, and went on to analyze those classifications in the light of the purpose of the act. In the court's view, workmen's compensation acts are sustainable as valid exercises of police power in the regulation of the master-servant relationship. The state has an interest in industrial accidents with their resultant burden upon the community, and a compensation system under which an employer was liable to pay compensation without question of fault and an employee was limited to a compensation recovery was deemed a reasonable classification.

When a compensation statute goes beyond the master-servant relationship, however, and attempts to regulate tort relations between employees and third parties, its classifications must submit to closer scrutiny.

In *Grasse*, the court declared at 412 Ill. 195-197, the classification of injured employees was:

> ". . . arbitrary and in no way promotes any of the objectives of the act. All employees entitled to compensation for injuries sustained in the course of their employment and caused by third persons are not treated alike. Those injured by third party tortfeasors bound by the act are not entitled to common-law

damages from such persons, whereas those injured by third party tort-feasors not bound by the act are allowed to institute actions for damages. Both classes of injured employees may be entitled to compensation from their own employers, so that the amount of compensation, if any, received by the injured employee is not the basis for differentiation between the classes. Nor is there any basis for differentiation from the nature of the injuries sustained, or from the activity of the employee at the time of the injury, or from any other factor ordinarily related to an injured party's right to recover damages. The sole basis for differentiation, as far as the injured employee is concerned, is a fortuitous circumstance—whether the third party tort-feasor happens to be under the act.

It is readily apparent that there is no rational difference between an employee injured in the course of his employment by a motor bus, and one injured by a farmer's truck. Each may sustain the same injuries, and be entitled to the same amount of compensation from their employers; neither had any control over the circumstances of their injuries, or the status of the party who hit them, yet in one case the statute authorizes the employee to recover damages from the third party, and in the other case the employee must be content with the amount of compensation he may be entitled to receive from his employer.

Furthermore, this first paragraph of section 29 operates to completely deprive an injured employee of any recovery whatsoever for his injuries where his own employer is insolvent. There is no provision in the act which resurrects and transfers back to the employee his common-law cause of action under those circumstances, so as to allow him to recover from the third party tort-feasor at least the amount of compensation due, as intimated by the dictum in the *Friebel case*.

[*Frichel v. Chicago City Railway Co.*, 280 Ill. 76, 117 N. E. 467 (1917)] Section 29 transfers the employee's right of action to the employer as the latter's absolute property, without giving the employee any lien upon it. It is inconceivable how such a result, which follows from the terms of the first paragraph of section 29, effectuates the purpose of the act."

Applying the *Grasse* court's analysis to the classifications involved in the instant case, we must conclude that the Virginia statute is equally arbitrary and unreasonable.

If the purpose of the Virginia Workmen's Compensation Act is the protection of the injured workman, Sections 65-26 and 65-37 as interpreted by the Virginia courts succeed in destroying the protection he had at common law without giving him anything in return against the negligent tortfeasor in appellee's position. This, it is submitted, is arbitrary and unreasonable.

It is of no consequence to appellant that the person who injures him on the job happens also to be on the business of an "owner" under Section 65-26. When he is injured, appellant is concerned with the rights he has to a recovery for his injuries and against whom he may assert those rights.

When the legislature limits his recovery against his immediate employer and against the "owner" to compensation benefits, he accepts this as a reasonable classification. It is reasonable because it bears a relationship, clearly discernible, to the purpose of the Act: that is, the protection of the working man in the master-servant relationship. It is reasonable because, in return for the surrender of his common law right to sue in tort, he has from his employer and from the "owner" a compensation liability independent of fault considerations and free from defenses.

But in the constitutional scheme it is inconceivable to appellant that the very person who causes his injuries by his negligence should, by sheer arbitrariness of classifica-

tion, escape tort liability for the consequences of his negligence. Were this classification based on *some* exchange of rights as between the two, it could be understandable; it could be reasonable; it could be valid.

Here there is no such exchange, and the injured employee is left to his compensation remedy or permitted a common law suit on the basis of the existence or non-existence of an artificially imposed "fellow-employee" relationship between him and the negligent third party.

Any classification that denies appellant his right to sue at common law for an injury negligently inflicted by someone not in a chain of employment with appellant, and further insulates the negligent third party from liability to pay or even guarantee compensation, must perforce be an unreasonable classification in violation of the equal protection clause of the Fourteenth Amendment.

CONCLUSION.

The Supreme Court of the United States has jurisdiction to review the judgment below. The questions are substantial.

Respectfully submitted,

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APPENDIX "A."

Text of Constitutional Amendment and Statutes Involved.

AMENDMENT XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

§ 65-5. *Employees of independent contractors.*—Nothing in this Act contained shall be construed to make, for the purposes of this Act, the employees of an independent contractor the employees of the person or corporation employing or contracting with such independent contractor. (1920, p. 257; 1936, p. 592; Michie Code 1942, § 1887(12).)

§ 65-26. *Liability of owner to workmen of sub-contractors.*—When any person (in this section and §§ 65-28 and 65-29 referred to as "owner") undertakes to perform or execute any work which is a part of his trade, business or occupation and contracts with any person (in this section and §§ 65-28 to 65-31 referred to as "sub-contractor") for the execution or performance by or under such sub-contractor of the whole or any part of the work undertaken by such owner, the owner shall be liable to pay to any workman employed in the work any compensation under this Act which he would have been liable to pay if the workman had been immediately employed by him. (1918, p. 641; 1924, p. 479; Michie Code 1942, § 1887(20).)

§ 65-27. *Liability of contractor to workmen of sub-contractor.*—When any person (in this and the four succeeding sections referred to as "contractor") contracts to perform or execute any work for another person which work or undertaking is not a part of the trade, business or occupation of such other person and contracts with any other person (in this section and §§ 65-28, 65-29, 65-30 and 65-31 referred to as "sub-contractor") for the execution or performance by or under the sub-contractor of the whole or any part of the work undertaken by such contractor, then the contractor shall be liable to pay to any workman employed in the work any compensation under this Act which he would have been liable to pay if that workman had been immediately employed by him. (1918, p. 641; 1924, p. 480, Michie Code 1942, § 1887(20).)

§ 65-28. *Liability of sub-contractor to workmen of sub-sub-contractor.*—When the sub-contractor in turn contracts with still another person (in this section and §§ 65-29, 65-30 and 65-31 also referred to as "sub-contractor") for the performance or execution by or under such last sub-contractor of the whole or any part of the work undertaken by the first sub-contractor, then the liability of the owner or contractor shall be the same as the liability imposed by the two preceding sections. (1924, p. 480; Michie Code 1942, § 1887(20).)

§ 65-30. *Indemnity of principal from sub-contractor.*—When the principal contractor is liable to pay compensation under any of the four preceding sections, he shall be entitled to indemnity from any person who would have been liable to pay compensation to the workman independently of such sections or from an intermediate contractor and shall have a cause of action therefor.

A principal contractor when sued by a workman of a sub-contractor shall have the right to call in that sub-contractor or any intermediate contractor or contractors as defendant or co-defendant. (1918, p. 642; Michie Code 1942, § 1887(20).)

§ 65-31. *Workman may recover from sub-contractor.*—Nothing in the five preceding sections shall be construed as preventing a workman from recovering compensation under this Act from a sub-contractor instead of from the principal contractor but he shall not collect from both. (1918, p. 642; Michie Code 1942, § 1887(20).)

§ 65-37. *Employee's rights under Act exclude all others.*—The rights and remedies herein granted to an employee when he and his employer have accepted the provisions of this Act respectively to pay and accept compensation on account of personal injury or death by accident shall exclude all other rights and remedies of such employee, his personal representative, parents, dependents or next of kin, at common law or otherwise, on account of such injury, loss of service or death. (1918, p. 640; 1920, p. 256; 1924, p. 478; 1930, p. 406; 1932, p. 486; 1936, p. 591; Michie Code 1942, § 1887(12).)

§ 65-38. *Subrogation of employer to employee's rights against third parties; evidence; recovery; compromise.*—The making of a lawful claim against an employer for compensation under this Act for the injury or death of his employee shall operate as an assignment to the employer of any right to recover damages which the injured employee or his personal representative or other person may have against any other party for such injury or death, and such employer shall be subrogated to any such right and may enforce, in his own name or in the name of the injured employee or his personal representative, the legal liability of such other party. The amount of compensation paid by the employer or the amount of compensation to which the injured employee or his dependents are entitled shall not be admissible as evidence in any action brought to recover damages. Any amount collected by the employer under the provisions of this section in excess of the amount paid by the employer or for which he is liable shall be held by the employer for the benefit of the injured employee or other

person entitled thereto, less such amounts as are paid by the employer for reasonable expenses and attorney's fees. No compromise settlement shall be made by the employer in the exercise of such right of subrogation without the approval of the Industrial Commission and the injured employee or the personal representative or dependents of the deceased employee being first had and obtained. (1920, p. 256; 1924, p. 479; 1930, p. 406; 1932, p. 486; 1936, p. 591; Michie Code 1942, § 1887(12).)

§ 65-99. *Duty to insure payment of compensation; effect of insurance.*—Every employer subject to the compensation provisions of this Act shall insure the payment of compensation to his employees in the manner hereinafter provided. While such insurance remains in force he or those conducting his business shall only be liable to an employee for personal injury or death by accident to the extent and in the manner herein specified. (1918, p. 640; Michie Code 1942, § 1887(11).)

APPENDIX "B."

Opinions and Judgments Below.

Opinion of the Law and Equity Court of the City of Richmond.

The issue before the Court in the instant case is whether the Court has jurisdiction, or The Industrial Commission of Virginia.

In brief, "The Richmond-Petersburg Turnpike Authority" was created by an Act of the General Assembly of 1954 (Chap. 705 Acts of 1954) Va. Code Sections 33-255.24 to 33-255.44 as a political sub-division of the Commonwealth, to exercise "the powers conferred * * * in the construction, operation and maintenance of the turnpike project * * *."

Among other things, it was authorized to obtain title to the right of way by purchase or under its powers of *eminent domain*, to finance the project by the sale of bonds or other methods, both temporary and permanent, and in general to do all things necessary or desirable to construct the turnpike and to operate the same as a toll road. The Richmond-Petersburg Turnpike Authority will be referred to as "Authority" or "Owner."

The Authority contracted with Parsons, Brinckerhoff, Hall and MacDonald as consulting engineers upon the project. They will be referred to as "Engineers." The contract with the Engineers was broad in scope and sweeping in terms providing for the latter furnishing the Authority complete engineering services of "high order of quality, employing competent and experienced personnel all equal to the best engineering practice prevalent, commensurate with the magnitude and intricacy of the work * * *." It was further provided that "the services shall be so complete that it will not be necessary for the Authority to supplement any of the operations by its own personnel, but the Author-

ity reserves the right * * * to establish such representatives on the work as may be in its judgment necessary to maintain proper liaison. * * *"

Mr. John Pershing, General Manager of the Authority, testified that Parsons, Brinckerhoff, Hall and MacDonald were employed by the Authority as the consulting engineers of the project by a negotiated written contract, the terms of which are embraced in letters dated September 10, 1954 and September 30, 1954, and accepted by the Authority by resolutions of its Board of Directors adopted in October, 1954.

Counsel, in view of the voluminous character of the various documents, stipulated that the witness Pershing could testify as to the pertinent portions of these documents without the production of the originals, and should either the Court or counsel desire photostatic copies of any portion or portions thereof, the same would be filed by the stipulation.

In view of this stipulation, Mr. Pershing testified that the letter of September 10, 1954 from The Engineers to The Authority proposes that Engineers "render engineering services which the proposal breaks down into three stages: Stage 1 is stated to be the preliminary stages; Stage 2 is stated to be the preparation of the contracts, plans, and specifications; and Stage 3 is stated to be the services in connection with the supervision of the construction of the turnpike. He further testified that the issues involved in the instant case comes under Stage 3 of the contract, as the plaintiff was injured during the construction of the turnpike.

Under the provisions of Section 33-255.28 setting out the powers of the Authority, the latter was empowered: to make all preliminary surveys in respect to the location of the turnpike, but subject to the approval of the Virginia State Highway Commission; to determine in its discretion the design standards and materials of construction; the construction, maintenance, and repair of the turnpike, and to operate the same after its construction.

Under its contract with "The Engineers," the latter was to furnish complete engineering services to the Authority, in fact "so complete that it will not be necessary for the Authority to supplement any of the operations by its own personnel * * *." Therefore, all preliminary surveys were made by The Engineers in reference to the location of the turnpike, that is, its right-of-way and the location of all of the offices and other facilities needed by The Authority; it also prepared and promulgated the design standards and materials of construction, and plans and specifications for the construction of the turnpike.

When the Engineers located and fixed the right-of-way for the Authority, the latter proceeded to acquire title to the property upon which the turnpike was to be located, as well as any necessary easements to enable The Authority to build and to operate the turnpike.

As title to the sections of the right-of-way were acquired by the Authority, plans and specifications for the roadway, bridges, etc., were prepared by the Engineers which were then approved by the Authority, and bids were called for. As the bids were received, they were submitted to the Authority with the recommendation of the Engineers, and The Authority awarded the contracts to the bidders as The Authority saw fit. According to Mr. Pershing "the plans and specifications were prepared progressively They involved a tremendous amount of work and, as plans and specifications became complete for a particular section, those plans and specifications were advertised and bids received for the construction of the work contemplated by those plans."

Among those contracts for work upon sections of the project, was the section let to the defendant Thorington Construction Company, designated as "A-5-G, Section A," which work consisted in building an overpass near the intersection of Boulevard and Kelly Road. Thorington Construction Company, herein called "Contractor" was engaged in erecting the sub-structure and abutments of the

overpass. In the work on the sub-structure, contractor was required to drive certain steel tubing which were in sections, and these sections were required to be welded as they were driven by pile-drivers, into the ground until they reached the required depth, that is, would penetrate a certain minimal distance by a given number of blows of the pile driver hammer.

It was while these welded steel tubes were being driven that the "accident" occurred and the plaintiff was injured. For these injuries the plaintiff seeks to recover damages from the defendant for its alleged negligence while driving the said welded piles.

Whether or not the Court has jurisdiction in this case depends upon the relationship between The Authority, The Engineers, the immediate employer of the plaintiff, and the Contractor.

While there is no doubt about the fact that under the act creating the Authority, the latter is a political sub-division of the Commonwealth of Virginia, it is equally clear that it is authorized to sue, and it may also be sued. Nor does any doubt exist that the title to the right-of-way and the constituent structures of the turnpike is vested in the Authority. The Authority was created for the express purpose of engaging "in the construction, operation and maintenance of the turnpike project * * *." Before the construction could begin, the Authority was obliged to locate the right-of-way, and having done this it had to acquire title to the lands upon which it would be constructed, either by purchase, or by the exercise of its power of eminent domain, as it was so empowered by the act creating the Authority. In a very real sense, the Authority is the owner of the right-of-way and the constituent structures of the Richmond-Petersburg Turnpike.

The Authority was authorized to acquire the necessary property and to build or construct the Turnpike. It could have employed a staff of its own as an engineering department to do all things relating to locating, planning and

building the turnpike, but it elected to employ the Engineers to render engineering services "so complete that it will not be necessary for the Authority to supplement any of the operations by its own personnel," even though the authority reserved "the right from time to time to establish such representatives on the work as may be, in its judgment, necessary to maintain proper liaisons." (Tr., pp. 27 and 28). And it appears The Authority did have in its employ a staff engineer to act as liaison engineer, to establish relations with Engineer and to have the latter's work interpreted by the Authority's staff for a more general and complete understanding. (Tr., p. 13).

It clearly appears from the record that the Engineer was "employed" by the authority to do all things which was required of the Authority in the nature of engineering services as above noted, including those services set out in Defendant's Exhibit A entitled "Specifications for Engineering Services for the Supervision of Construction—Stage 3." For all practical purposes, the Engineer was, under the contract with the Authority acting for and on behalf of the Authority, and therefore required to locate, the turnpike, prepare and promulgate design standards and materials for the construction of the turnpike, under Stages 1 and 2 of the contract, as well as to supervise the work of the contractors and sub-contractors in the execution of their work upon the turnpike, under Stage 3 of said contract. In every instance, under this contract the engineers were acting for and on behalf of the Authority, which in a very real sense was the "Owner" of the Turnpike. The Authority was created by the act to acquire the title to the right-of-way; it was created to construct the turnpike and after its construction, The Authority was created to operate the turnpike, as well as maintain it and keep it in repair. It appears to the Court that the Authority was not only the "Owner" as contemplated by Section 65-26 of the Virginia Code of 1950, but in employing Engineers acting on its behalf to construct the Turnpike, it was contracting to have

the Engineer undertake to perform "a part of the trade, business or occupation of" the Authority and Owner, and; the Owner, The Engineer as Contractor or Sub-Contractor, engaged with others (Sub-Contractors) for the completion of the work, the "Owner" or contractor, or sub-contractors under this section and the following sections of the code, each respectively became responsible to the employees of the persons employed upon the work according to the provisions of Sections 65-26, 65-27, 65-28 and 65-29, with indemnity provided for by Section 65-30.

It would be interesting to apply to the facts of this case, the rules announced in the cases of *Hann v. Times Dispatch*, 166 Va. 102, 184 S. E. 183; *Texas Co. v. Zeigler*, 177 Va. 557, 14 S. E. (2) 704; *Ross v. Schneider*, 181 Va. 931, 27 S. E. (2) 154; *Craig v. Doyle*, 179 Va. 526, 19 S. E. (2) 675; *Phillips v. Brinkley*, 194 Va. 62, and many other cases on the subject, as one could possibly find such control over the so called sub-contractors and their servants as would make the relationship between the "Owner" or Authority and the employees of the various sub-contractors that of master and servant, but this seems unnecessary to the decision of the case, as the evidence rather shows that the sub-contractors such as the defendant, Thorington Construction Company, were only responsible for the result of its work, that is the completion of their contract in accordance with plans and specifications, and it had the right to select its own employees, and its own methods and means of doing the work, subject only to adhering strictly to the plans and specifications. The only control which the Authority retained was to have its Engineer check upon the work of Contractor as it progressed, through an Inspector, to make certain Contractor was using the material as specified, and was doing the work in a manner which would insure the finished product being in accordance with the contract, plans and specifications. In this regard, the Court is of the opinion that the defendant Thorington Construction Company was an independent contractor in its contract relations to the

Authority. In the opinion of the Court, the strongest position in which the plaintiff could find himself, in order to sustain this action would be to have the Engineers, as well as the defendant Thorington Construction Company held to be independent contractors, and the Court so holds. The authorities cited in the brief of the plaintiff support and sustain the conclusion, not only as to Engineers but the defendant Thorington Construction Company as well. It is also clear that "Authority," "Engineers" and Contractor are "Employers" as defined by the Workmen's Compensation Act, Va. Code of 1950 Section 65-3.

The cases cited are:

Comr. Inter. Rev. v. Modjeski, 75 F (2) 468
Metcalf & Eddy v. Mitchell, 269 U. S. 514, 46 S. Ct. 172
Comr. Inter. Rev. v. Kelker, 95 F (2) 647
Warner v. Messick, 117 Pa. (2) 482
Phillips v. Brinkley, 194 Va. 62, 72 S. E. (2) 339.

The status of The Authority, The Engineers, the Contractor, Thorington Construction and the plaintiff, Anderson, are largely determinative of the issues in this case relating to jurisdiction.

As stated above, Anderson was an employee of the Engineers at the time of the accident. He was engaged in inspecting the work of Thorington Construction Co., a Contractor, which had been awarded a contract to construct a section of the turnpike, viz: Building the sub-structure of an overpass over The Boulevard and Kelley Road in the City of Richmond. The defendant, Thorington Construction Co. herein referred to as "Contractor" or "Sub-Contractor," contracted to put in the piles according to specifications, and to do the other work as set out in the contract, *pland* [sic] and specifications. A part of the work consisted in driving steel tubes into the ground with a pile driver until a solid foundation should be reached. These steel tubes were in sections or lengths, and in order to reach the required depth so as to support the bridge across Boulevard,

the section driven into the ground had some portion protruding above ground, and to this end so protruding another length of tubing was welded, end to end. This process proceeded until the tube reached the required depth, determined by the plans and specifications as interpreted by the inspector employed by the Engineer. The inspector in this case was the plaintiff, Anderson. Not only did the inspector Anderson observe the driving of the tube and approve it as having reached solid foundation, but he constantly observed this and other work of the contractor, among other things, whether or not the ends of the steel tubes were properly welded in accordance with the plans and specifications. On the day of the accident, after a length of steel tubing had been welded, when the hammer of the pile driver came down upon the upper end of the tube, "the splice was broken" and a piece of metal struck the plaintiff in the eye. He testified:

"I was going to stop the pile rig when this splice was broken, because they (the welders) has just gotten off it and they (pile drivers) started hitting the pile when it was hot and that is what caused the pile to misplace." (Tr., p. 49).

All of the plaintiff's work at the time of the accident related to his duties in respect to the determination of the lineal feet of pile (steel tube) driven and that above ground, used in the work of obtaining support, or foundation for the bridge; in seeing that the materials used were as specified, and in seeing that the work proceeded in accordance with the plans and specifications.

The plaintiff was, as an employee of the Engineers, executing a part of the work which the Engineers contracted with the Authority to do, in and about the construction of the Turnpike.

As above noted, The Authority was created for the express purposes set out in the act creating it. (Acts Gen. Assembly of Va. 1954, Ch. 705 Va. Code Sections 33-255.27-33-255.44). Code Section 33-255.27 provides: "*The Richmond-Petersburg Turnpike Authority.* There is hereby

created and constituted a political sub-division of the Commonwealth to be known as "The Richmond-Petersburg Turnpike Authority." The exercise by the Authority of "*the powers conferred by this article in the construction, operation and maintenance* of the turnpike project authorized by this article shall be deemed and held to be the performance of an essential governmental function. * * *." (Italics supplied).

The grant of powers is found in Section 33-255.28.

"(a) To determine the location, subject to the approval of the State Highway Commission, of the turnpike project, to determine, in its discretion and without reference to any other provisions of this article or any other law, the design standards and the materials of construction, and to construct, maintain, repair and operate the same;

"(f) To acquire, hold and dispose of real and personal property in the exercise of its powers and the performance of its duties;

"(h) To make and enter into all contracts and agreements necessary or incidental to the performance of its duties and the execution of its powers under this article;

"(i) To employ, in its discretion, consulting engineers, attorneys, accountants, construction and financial experts, superintendents, managers, and such other employees and agents as may be necessary in its judgment, and to fix their compensation;

"(o) To sue and be sued, * * *."

"(p) To do all other acts and things necessary or convenience to carry out the powers expressly granted in this article; * * *."

It is to be observed from reading the foregoing, that the Authority was created for the express purpose of: (1) locating the route of the Turnpike: (2) acquiring title to the land necessary to construct the Turnpike: (3) Constructing the Turnpike: (4) Operating the Turnpike: (5)

Repairing and maintaining the Turnpike after it is in operation. While the ultimate end and object of the Legislature in creating the Authority was to have it operate the Turnpike as a toll road, it is wholly illogical to contend that such purpose was the paramount and sole end and object. It is no less a function of the Authority to acquire title to the right-of-way, to construct the turnpike, to repair and maintain it, than it is to operate the facility, after the acquisition of the right-of-way and the construction of the Turnpike.

In a very real sense, the Authority was engaged at every step of the way, in the course of its usual trade, business or occupation, from the preliminary surveys, through the acquisition of the right-of-way, the construction, and the final operation, maintenance and repair of the Turnpike. The Legislature has so declared by vesting it with the power and charging it with the responsibility of so doing.

This Court holds that the Authority was and is the owner of the right-of-way and all of the real and personal property purchased or acquired by it in discharging its duties imposed, and in exercising its power vested in it in this effort. It holds that in all its activities, exercising its powers pursuant to the statute law creating it, it is engaged in the course of its usual trade, business or occupation.

The Authority contracted with the Engineers, who under the contract were to furnish complete engineering services to the Authority, and in discharging that contract, the Engineers, were an independent contractor. Similarly, Thorington Construction in the discharge of its contract, was an independent contractor.

Applying the provisions of the "Virginia Workmen's Compensation Act" to the facts in this case, as interpreted by The Supreme Court of Appeals of Virginia, it is to be noted that Section 65-26 Va. Code (1950) provides:

"When any person (in this section and sections 65-28 and 65-29 referred to as owner) undertakes to perform or execute, any work which is a part of his trade, business or

occupation and contracts with any other person (in this section and sections 65-28 to 65-31 referred to as sub-contractor) for the execution or performance by or under such sub-contractor of the whole or any part of the work undertaken by such owner, the owner shall be liable to pay any workman employed in the work any compensation under this Act which he would have been liable to pay if such workman had been immediately employed by him."

Section 65-37 of Va. Code (1950) provides that: "The rights and remedies herein (Va. Workmen's Compensation Act) to an employee when he and his employer have accepted the provisions of this Act respectively to pay and accept compensation on account of personal injury or death by accident shall exclude all other rights and remedies of such employee * * *."

There is no doubt that the Authority, the Engineer and the defendant contractor all accepted the provisions of the Act and did all things necessary to comply with its provisions to qualify thereunder. Indeed The Authority in each of its contracts with the "Engineers" and all persons, firms and corporations with whom the Authority contracted for the building of the Turnpike or any section of the Turnpike, required such party to come under the compensation laws of the state and fully qualify thereunder, including the procuring of workmen's compensation insurance. It is also true that the plaintiff Anderson as an employee of Engineer, comes under the Workmen's Compensation Act, since he did nothing to take himself out of its provisions as required by Section 65-20 of the Virginia Code.

Section 65-5 (Va. Code 1950) provides that:

"Nothing in this Act contained shall be construed to make, for the purposes of this Act, the employees of an independent contractor the employees of the person or corporation employing or contracting with such independent contractor."

Notwithstanding this section, the provisions of Sections 65-26 through 65-31 inclusive, make the Owner, the General Contractor, Sub-Contractor, etc., liable for the payment of compensation to an injured employee, under certain circumstances, of another independent sub-contractor, regardless of the provisions of Section 65-5.

The Supreme Court of Appeals has in its decisions lighted the pathway sufficiently to enable this Court to conclude that the plaintiff's remedy is before The Industrial Commission of Virginia, and this Court is without jurisdiction.

It seems unnecessary to review and analyze all the cases decided by our Supreme Court of Appeals, since the enactment of Section 20 (a) of the Compensation Act in 1920, and the amendments thereof. (Now embraced in Va. Code Sections 65-26 through 65-31 inclusive.)

The first case to be considered is *Feitig v. Chalkley*, 185 Va. 96, wherein Chalkley sued his fellow employee Feitig to recover damages for injuries sustained by Chalkley when the truck of Nolde Bros., was wrecked through the alleged negligence of Feitig. It was held that both Feitig and Chalkley were both employees of Nolde Bros. acting in the scope of their employment at the time of the wreck; that the accident arose out of their employment, and that Chalkley was entitled to receive the indemnity provided by the Workmen's Compensation Act. The Court further concluded that the plaintiff Chalkley's rights thereunder were exclusive of all other rights against all persons except those who were strangers to the employment, i. e., a negligent third party.

In this regard, the Court held that fellow-servants were not strangers to the employment, and that Chalkley could not maintain the action against his fellow employee.

The next case with which we should be concerned is *Sykes v. Stone & Webster*, 186 Va. 116. In that case, Stone & Webster as principal contractor and Richmond Structural Steel Co., as sub-contractor were engaged in erecting

a power station in Chesterfield County. Raymond H. Sykes, an employee of the sub-contractor, was injured by the alleged negligence of Stone & Webster, the principal contractor. The administratrix of Sykes instituted an action against the principal contractor to recover for the death of Sykes by reason of the wrongful acts of Stone & Webster. The question involved was whether or not the action at law could be maintained, or whether the only remedy was under the Virginia Workmen's Compensation Act.

The Court held that Stone & Webster was the "Contractor" which contracted with "another person" here called "Contractee" to perform or execute work for the "contractee," which work was not a part of the trade, business or occupation of the contractee, and "contractor" then contracted with still "another person," Richmond Structural Steel Co., designated in the section 65-28, as well as Sections 65-29, 65-30 and 65-31 as "sub-contractor," "for the execution of a part of the work undertaken by such "contractor" and that the contractor is *liabile* [sic] to any workman employed in the work by the sub-contractor, for "any compensation under the act which he would have been liable to pay if that workman had been immediately employed by him," the contractor. The Court further held that the dependents of the decedent Sykes were entitled to workmen's compensation as provided by the Act, and therefore, because of the provisions of Section 65-37 the rights, and remedies under the Virginia Workmen's Compensation Act were exclusive of all other rights and remedies of the employee or his personal representative, at common law or otherwise.

The Court also held that the provisions of Section 65-38 (Va. Code 1950) giving to an injured employee, or to the personal representative of a deceased employee, or to the employer who has paid compensation to the injured employee, or the dependents of a deceased employee, the right to recover damages from "any other party for such injury

or death" did not give that right of action against any person, except those *other* "Persons who are strangers" to the employment and the work.

The Court held further, that under Section 65-27; Stone & Webster having contracted to build the power plant, which work was part of its trade, business or occupation, and had contracted in turn with Richmond Structural Steel Co. to do a part of the work, Stone & Webster would be liable to the employees of Richmond Structural Steel Co. for compensation as if that employee were immediately employed by Stone & Webster, and therefore neither that employee, nor his employer, nor the insurance carrier of the employer, could maintain an action against Stone & Webster.

Another case to be considered is *Sears, Roebuck & Co. v. Wallace*, 172 F (2) 802. In this case, the defendant, Sears, Roebuck & Co. was the lessee of a building in the City of Norfolk, which it used as a storage warehouse. It entered into a contract with a general contractor for alterations to the building. The general contractor, in turn entered into a contract with a sub-contractor for a part of the work, viz: the brick work. The plaintiff Wallace was employed by the sub-contractor as a foreman of the bricklayers and other workmen.

The defendant, engaged in merchandising, and while the warehouse, when completed was to be used in the defendant's business of merchandising, it was not a part of its trade, business or occupation to erect, or to make physical changes in the structure.

In the defendant's building were two elevators which were used by the employees of both the general contractor and the sub-contractor, with the consent of the owner.

On the day of the accident, the plaintiff's hand was caught in the safety door of the elevator, which stayed open instead of closing when the elevator left the floor level due to faulty mechanism. When the plaintiff sought to close the safety door he was injured as aforesaid. The Court

held that Wallace could maintain his action against the defendant, because the defendant's "Trade, business, or occupation" was not that of a builder; that it as "owner" had not "undertaken to perform or execute any work which was a part of its trade, business or occupation, and contracted" with another person (in this section referred to as 'sub-contractor'" (Section 65-26 Va. Code 1950) for the execution of all or any part of the work by or under such sub-contractor. The Court as a result also held that since under Section 65-26, th defendant would not have been liable to Wallace for the payment of Workmen's Compensation the defendant was the "other party" contemplated by Section 65-38 of the Va. Code of 1950, against whom the right of action of the injured employee might be asserted.

In the case of *Rea, Adm'r. v. Ford*, 198 Va. 712, 96 S. E. (2) 92, the facts were that the City of South Norfolk, desired to erect a high school, and contracted with John W. Daniel & Co., Inc., as principal contractor to execute the work thereon. Daniel & Co. rented from W. W. Ford a crane, with its operator and helper for the purpose of hoisting in place certain trusses. In this work, the crane was operated by Wilson and a helper, Calhoun, employed by Ford, but they were under the direction and control of Jurgensen, Daniel's superintendent, and the deceased Rea, who worked under Jurgensen. It was alleged that the crane crew negligently operated the crane, causing one of the trusses to fall and kill Rea. His dependents received Workmen's Compensation from Daniel's Compensation Insurance Carrier, and the latter, pursuant to the provisions of Section 65-38, filed action against Ford.

Mr. Justice Eggleston, delivered the opinion of the Court, and in the course of the opinion (198 Va.) at p. 717 said:

"In the present case Ford, the defendant, was no stranger to the business of Daniel, the principal contractor. On the contrary, in furnishing the equipment and crew for

the purpose of erecting the steel structure Ford was a subcontractor engaged in an essential part of the work which the principal contractor had to do. Thus he was not an 'other party' within the meaning of Code Section 65-38. Like the principal contractor, Ford was under the canopy of the Workmen's Compensation Act and not subject to an action at law for damages for injury to or death of Rea who was engaged in the same work. Code Section 65-37 *supra*."

The trial court struck the plaintiff's evidence on the ground that the plaintiff's exclusive remedy was before the Industrial Commission, and the Supreme Court of Appeals affirmed the lower court.

In *Coker v. Gunter*, 191 Va. 747, Lock Joint Pipe Company, under a contract with the City of Norfolk, was laying a 40 inch pipe line. The pipe was being laid in 16 foot sections, in a ditch 5 feet wide. The ditch was being excavated with a motor driven ditching machine owned and operated by Lock Joint Pipe Co. Lock Joint rented from Gunter a truck and driver, and this truck was used to haul away the excess material from the ditch after the pipe was laid and covered with the earth taken from the ditch. Minggia was the driver of the truck. Coker, an employee of Lock Joint, was among other duties, directing the truck driver in regard to moving to the ditch digger to be loaded, and then hauling the load away. In some manner the truck was backed over Coker's leg and he was severely injured. Coker filed common law actions against both Minggia and Gunter, the general employer of Minggia. At the conclusion of the plaintiff's evidence the Court struck the same, but the jury returned a verdict for the plaintiff. The court set the verdict aside and entered judgment for the defendants. The Supreme Court of Appeals affirmed the judgment of the lower court, on the grounds that Minggia was under the control of Lock Joint in executing the work assigned to him and his truck. Mr. Justice Buchanan, at

p. 755 said: "Minggia's obedience to Lock Joint's directions were not mere cooperation, but complete subordination. * * *"

Because, Lock Joint, the special employer of Minggia had the right to control both the manner and means by which Minggia accomplished his assigned tasks, he was an employee of Lock Joint, as was Coker, and that Coker's rights were exclusively under the Compensation Act, he could not maintain his action at law against a fellow servant, under *Feitig v. Chalkley, supra*, nor against his general employer Gunter, under the theory of *respondeat superior.*

The only other case which need be considered is *Kramer v. Kramer*, 199 Va. 409. The facts in this case were as follows: Arlington Church of Christ was desirous of erecting a new church, and had an architect prepare plans and specifications. The church then called for bids from various artisans for a part of the work. The Chairman of the Building Committee of the church entered into a contract with August F. Kramer to do the carpentry work as set out in the contract and the plans and specifications. In fact all of the work in building the church was to have been done by letting all the work to contractors in their special field. It is not questioned that it was not a part of the "trade, business, or occupation" of the church to build its edifice, but the finished building was to be used by it as a place of worship. There was no general contractor as in the usual case who sub-contracted a part of the work undertaken by him.

During the construction work, it became necessary to put six laminated wooden trusses or arches in place. These trusses were about 40 feet high and weighed from two, to two and one-half tons each. This was not part of the work of the defendant A. F. Kramer's contract, according to the plaintiff's evidence, but the defendant alleged and offered evidence to prove it was a part of his work. This

conflict was left to the jury and it was resolved against the defendant.

Old Dominion Hoisting Service contracted with the Church to furnish a crane, an operator thereof, and a helper. As a result of the verdict, the Supreme Court held that both A. F. Kramer, the defendant and Old Dominion Hoisting Service were independent contractors on the church project; that Gustave Kramer, the deceased employee of Old Dominion Hoisting Service, no relation of A. F. Kramer, and since the Church in attempting to erect the Church was not engaged in the course of its usual trade, business or occupation had not contracted with another, to undertake the work, there was no "contractor" who had in turn contracted with another called "sub-contractor" which would make the defendant A. F. Kramer liable to the defendant Gustave Kramer for compensation under any of the provisions of Sections 65-26 to 65-31 inclusive. The Court further held that as between the defendant A. F. Kramer and Old Dominion Hoisting Service, as well as the latter's employee Gustave Kramer each were strangers to the other as engaged in the particular work, and that the personal representative of Gustave Kramer, deceased, could maintain the common law action against A. F. Kramer, the defendant.

A fair summation of the analysis of the foregoing cases and the resulting rule of law therefrom may be thus stated:

(1) A servant cannot maintain an action at law against his fellow servant to recover damages for injuries sustained by reason of the negligence of the fellow servant, where the injuries resulted from causes which "arose out of and in the course of" the servant's employment entitling him to indemnity by way of compensation from the employer of both servants. (*Feitig v. Chalkley, supra.*)

(2) Where an independent contractor contracts with an "owner" to do work which is not a part of the trade, busi-

ness, or occupation of the "owner," but such is a part of the trade, business, or occupation of the independent "contractor," and the latter contracts with another, called "sub-contractor," to do a part of the work undertaken by the "contractor" injured by the negligence of the servants of the "contractor," may not maintain an action against the "contractor" if the injuries resulted "from an accident arising out of and in the course of" the injured man's employment entitling him to indemnity by way of the Workmen's Compensation Act, from either his immediate employer the "sub-contractor" or the independent "contractor," because no person, except a stranger to the work and not under "the canopy of the Act," can maintain the action, since as between those under said "canopy" the rights thereunder are exclusive. (*Sykes v. Stone & Webster, supra.*)

(3) Where an "owner," contracts with another (John W. Daniel & Co., Inc.), "contractor" to undertake work, not a part of the "owners" trade, business, or occupation, but a part of the "contractors" trade, business or occupation, and "contractor" contracts with another (Ford) as "Sub-Contractor," to do a part of the work undertaken by "Contractor," and while so engaged a workman employed by "Contractor" is injured by the negligence of an employee of "sub-contractor," under circumstances which entitle the injured employee of contractor to indemnity under the Workmen's Compensation Act, that remedy is exclusive. Since the remedy is exclusive, the injured employee of "Contractor" cannot maintain an action at law for the injuries against the employee of the "Sub-Contractor" nor the Sub-Contractor, since all are under the "canopy" of the Workmen's Compensation Act. (*Rea, Admr. v. Ford, supra.*)

(4) Where a "contractor" Lock Joint Pipe Co. contracted to do certain work, a part of its trade, business, or occupation, and contracted with Coker, Sub-Contractor to

haul certain excavated soil, with his truck and driver. An employee of "Contractor" was injured by the Driver of the truck. The court held that the injured employee being entitled to indemnity under the Workmen's Compensation Act, could not maintain his action against the truck driver, a "loaned" employee to contractor, and therefore a fellow servant of the plaintiff, nor against the sub-contractor under the theory of *respondeat superior*, since at the time the sub-contractor was not the "master" of the truck driver. (See *Coker v. Gunter, supra.*)

(5) Where an "owner" undertakes to have work done for him by "sub-contractors," which work is not a part of the trade, business or occupation of the "owner," and an employee of one sub-contractor is injured through the negligence of another "sub-contractor," under circumstances that would entitle the injured workman to indemnity under the Workmen's Compensation Act from his immediate employer, such injured employee may maintain an action at law aganst the negligent sub-contractor to recover damages, because as between the two "sub-contractors," there are no relations in respect the work undertaken. They do not contract with an "owner" (under Va. Code Section 65-26) to undertake to do work, which a part of "owners" trade, business or occupation, nor with a "contractor" who had undertaken to execute work, though not a part of "owners" "trade, business or occupation," was a part of such "contractor's" trade, business, or occupation, as provided by Va. Code Section 65-27, but instead they contracted with the "owner" to do certain work, not a part of owner's trade, business or occupation. Each contracted with the "owner" independently of each other, and as to the work being done by each they were strangers to each other. (See *Kramer v. Kramer, supra.*)

(6) Where an owner contracted with Contractor to do certain work, not a part of the trade, business, or occupation of "owner," but a part of the trade, business or occu-

pation of "contractor," who in turn contracted with sub-contractor to execute a part of the work undertaken by contractor. An employee of sub-contractor injured by the negligence of "owner," though entitled to indemnity under the Workmen's Compensation Act from either "contractor" or "Sub-Contractor," he could nevertheless, maintain an action at law to recover damages from owner. (*Sears, Roebuck & Co. v. Wallace, supra.*)

From the rules of law established by these cases, in construing the Workmen's Compensation Act, it seems clear that the plaintiff Anderson, an employee of Engineer, a sub-contractor, who undertook to execute a certain work, which was a part of the trade, business, or occupation of The Authority, "Owner," cannot maintain this action at law to recover damages from another sub-contractor, similarly undertaking to execute certain work for Authority as "owner," which was likewise a part of the trade, business, or occupation of owner.

These conclusions are reached also after giving due consideration to the cases cited by the plaintiff, as follows:

Bamber v. Norfolk, 138 Va. 26, 121 S. E. 564; *Portsmouth v. Daniels*, 156 Va. 614, 162 S. E. 324, and *Board of Supervisors v. Boaz*, 176 Va. 126, 10 S. E. (2) 498.

These cases are clearly distinguishable from the case at bar, especially when considered in the light of the more recent cases on the subject, beginning with *Feitig v. Chalkley* (*supra*) and above analyzed in this opinion. *Bamber v. Norfolk* has been fully explained by the Supreme Court of Appeals in the cases above mentioned and analyzed. The cases of *Portsmouth v. Daniels* and *Board of Supervisors v. Boaz*, when limited to the facts and construed in the light of the dissenting opinion by Spratley, J. (176 Va. p. 132, et seq.) and the later decided cases, have no value as precedents in this case.

The order sustaining the Special Plea to the jurisdiction of the Court and dismissing the case will be entered whenever counsel shall present a draft of the order.

J. H. RIVES, JR., Judge.

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ORDER.

The Court, after hearing the issues raised by the Special Plea herein and giving due consideration thereto, doth order that the Special Plea be sustained and that this action be, dismissed with costs to the defendant.

To which action of the Court the plaintiff objects and excepts.

Enter July 16, 1958.

J. H. R.

Opinion of the Supreme Court of Appeals of Virginia

RECORD NO. 4986

THRAVES LOCKETT ANDERSON

v.

THORINGTON CONSTRUCTION COMPANY, INCORPORATED

FROM THE LAW AND EQUITY COURT OF THE CITY OF RICHMOND

John H. Rives, Jr., Judge

OPINION BY CHIEF JUSTICE JOHN W. EGGLESTON

Richmond, Virginia, October 12, 1959

Present: All the Justices.

Thraves Lockett Anderson, sometimes hereinafter called the plaintiff, filed an action at law against Thorington Construction Company, Incorporated, hereinafter referred to as Thorington or the defendant, to recover damages for personal injuries alleged to have been caused by the negligence of the defendant's servants during the construction of a portion of the Richmond-Petersburg Turnpike. The plaintiff alleged that at the time of his injuries the defendant was engaged in certain construction work on the turnpike under a contract with the Richmond-Petersburg Turnpike Authority, and that he, the plaintiff, was performing his duties as a project inspector for Parsons, Brinckerhoff, Hall & MacDonald, consulting engineers for the Authority.

The defendant filed a special plea alleging that the lower court was without jurisdiction of the action at law because, it said, the matter was within the exclusive jurisdiction of the Industrial Commission of Virginia. After hearing evidence on the issues raised by the plea the lower court entered a final judgment sustaining the plea and dismissing the action. We granted the plaintiff a writ of error.

The facts are not in dispute. By the Act of the General Assembly of 1954, ch. 705, p. 920,[1] the General Assembly created the Richmond-Petersburg Turnpike Authority, hereinafter referred to as the Authority, as a "political subdivision of the Commonwealth," to exercise "the powers conferred * * * in the construction, operation and maintenance of the turnpike project" which was to be deemed "to be the performance of an essential governmental function." Among other things, the Authority was authorized to determine the location of the turnpike project, to obtain title to the right of way by purchase or under its power of eminent domain, "to construct, maintain, repair and operate the turnpike project," to issue revenue bonds for financing the project, and in general to do all other acts and things necessary or convenient "to carry out the powers expressly granted" to it. It was empowered to sue and was subject to be sued.

Pursuant to these grants of power the Authority contracted with Parsons, Brinckerhoff, Hall & MacDonald, an engineering firm of the city of New York, hereinafter referred to as the Engineers, to provide the services of consulting engineers for the project. The work of the Engineers consisted of a preliminary stage, followed by the preparation of all contract plans and specifications for the turnpike. Then, as these plans and specifications were approved by the Authority and construction work begun, it became the duty of the Engineers to see that the construc-

1. This Act has been codified as §§ 33-255.24 to 33-255.44, both inclusive, of the Code of Virginia of 1950, as amended.

tion was performed in accordance with the approved specifications. To carry out this latter phase of its work the Engineers employed resident engineers and inspectors to supervise and inspect each project involved in the construction of the turnpike. The plaintiff, Anderson, was among those employed by the Engineers for this purpose.

Since the Authority had no force of employees by which it could do the necessary construction work, it awarded the construction of various sections of the work to a number of contractors. Thorington and two other contractors, combined as joint adventurers, were awarded the contract to perform a section of this work. It was during the performance of this contract which was being supervised by Anderson on behalf of his employer, the Engineers, that Anderson was injured.

Under the terms of their contracts with the Authority each contractor, including the Engineers, was required to carry workmen's compensation insurance for its own employees. The Authority also carried such insurance. Consequently, when Anderson, the plaintiff, was injured, the Authority, the Engineers and Thorington were covered by workmen's compensation insurance. Anderson was paid workmen's compensation benefits by the compensation insurance carrier for the Engineers, his employer. Thereafter he brought this suit against Thorington, the party allegedly responsible for his injuries.

Upon the evidence submitted on the issues raised by the special plea the lower court found that both Thorington and the Engineers were independent contractors with and under the Authority. Hence, the critical question is whether under the relationship of the parties and the circumstances stated, the plaintiff, an employee of the Engineers, one independent contractor on the project, may maintain an action at law against Thorington, another independent contractor on the project, to recover damages for his injuries caused by the negligence of the servants of the defendant independent contractor, or whether the plaintiff's right to re-

cover workmen's compensation benefits in his exclusive remedy.

The determination of the question depends upon the interpretation and application of the pertinent provisions of the Workmen's Compensation Act embodied in the Code sections printed or referred to in the margin.[2]

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2. "§ 65-5. *Employees of independent contractors.*—Nothing in this Act contained shall be construed to make, for the purposes of this Act, the employees of an independent contractor the employees of the person or corporation employing or contracting with such independent contractor."

"§ 65-26. *Liability of owner to workmen of subcontractors.*—When any person (in this section and §§ 65-28 and 65-29 referred to as 'owner') undertakes to perform or execute any work which is a part of his trade, business or occupation and contracts with any other person (in this section and §§ 65-28 to 65-31 referred as to 'subcontractor') for the execution or performance by or under such subcontractor of the whole or any part of the work undertaken by such owner, the owner shall be liable to pay to any workman employed in the work any compensation under this Act which he would have been liable to pay if the workman had been immediately employed by him."

Similarly, under Section 65-27 a contractor is liable for compensation to workmen of the subcontractor, and under Section 65-28 a subcontractor is liable to workmen of a sub-subcontractor.

"§ 65-30. *Indemnity of principal from subcontractor.*—When the principal contractor is liable to pay compensation under any of the four preceding sections, he shall be entitled to indemnity from any person who would have been liable to pay compensation to the workman independently of such sections or from an intermediate contractor and shall have a cause of action therefor."

"§ 65-31. *Workman may recover from subcontractor.*—Nothing in the five preceding sections shall be construed as preventing a workman from recovering compensation under this Act from a subcontractor instead of from the principal contractor but he shall not collect from both."

"§ 65-38. *Subrogation of employer to employee's rights against third parties; * * *.*—The making of a lawful claim against an employer for compensation under this Act for the injury or death of his employee shall operate as an assignment to the employer of any right to recover damages which the injured employee or his personal representative or other person may have against any other party for such injury or death, and such employer shall be subrogated to any such right and may enforce, in his own name or in the name of the injured

In *Sykes v. Stone & Webster Engineering Corp.*, 186 Va. 116, 41 S. E. 2d 469, we held that the employee of a subcontractor could not maintain against the principal contractor a common-law action for damages for personal injuries. We there pointed out that Section 65-5 (then the last paragraph of § 12 of the Act as amended), providing that the employees of an independent contractor are not the employees of the person who employed the independent contractor, must be read and reconciled with Sections 65-26 to 65-28, both inclusive (then § 20(a) of the Act as amended), which make the owner, contractor and subcontractor, respectively, liable for compensation benefits, and that if the workman is doing work which the owner has undertaken to perform as a part of his own trade, business or occupation, the owner is liable to the workman for compensation. On the other hand, we said that if the work which the workman is doing is not a part of the trade, business or occupation of the owner, and the owner contracts with a contractor to do it, the contractor, but not the owner, is liable to the workman for compensation under the Act. 186 Va., at pages 121, 122, 41 S. E. 2d, at pages 471, 472.

We further pointed out that the "other party" who is amenable to a common-law action by an employee under

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employee or his personal representative, the legal liability of such other party. * * *"

§ 65-37. *Employee's rights under Act exclude all others.*—The rights and remedies herein granted to an employee when he and his employer have accepted the provisions of this Act respectively to pay and accept compensation on account of personal injury or death by accident shall exclude all other rights and remedies of such employee, his personal representative, parents, dependents or next of kin, at common law or otherwise, on account of such injury, loss of service or death."

§ 65-99. *Duty to insure payment of compensation; effect of insurance.*—Every employer subject to the compensation provisions of this Act shall insure the payment of compensation to his employee in the manner hereinafter provided. While such insurance remains in force he or those conducting his business shall only be liable to an employee for personal injury or death by accident to the extent and in the manner herein specified."

Section 65-38 "refers exclusively" to one who is a stranger to the employment and the work and does not include one who has accepted the Act and is within the express terms of Section 65-99. (186 Va., at pages 120, 121, 41 S. E. 2d, at page 471.) Continuing, we said:

> "It clearly appears to be the purpose of section 20(a) [now §§ 65-26 to 65-31] to bring within the operation of the Compensation Act all persons engaged in any work that is a part of the trade, business or occupation of the original party who undertakes as owner, or contracts as contractor, to perform that work, and to make liable to every employe engaged in that work every such owner, or contractor, and subcontractor, above such employe. But when the employe reaches an employer in the ascending scale, of whose trade, business or occupation the work being performed by the employe is not a part, then that employer is not liable to that employe for compensation under section 20(a). At that point paragraph 5 of section 12 [now § 65-5] intervenes and the employe's right of action at common law is preserved." 186 Va., at pages 122, 123, 41 S. E. 2d, at page 472.

These principles were reaffirmed in *Rea v. Ford*, 198 Va. 712, 96 S. E. 2d 92, in which we held that the personal representative of an employee of a principal contractor could not maintain an action for wrongful death against a subcontractor because such contractors were not strangers to the employment and the work and were under the canopy of the Act. 198 Va., at page 717, 96 S. E. 2d, at page 96.

On the other hand, in *Kramer v. Kramer*, 199 Va. 409, 100 S. E. 2d 37, we held that where two independent contractors were engaged in constructing a church, the personal representative of one independent contractor might maintain an action for wrongful death against the other independent contractor, because the work of building the church was not a part of the trade, business or occupation

of the church so as to make it liable for compensation under Section 65-26.

In the present case both independent contractors, Thorington and the Engineers, were engaged in the construction of the turnpike which was a part of the trade, business or occupation of the owner, the Authority. As the trial court aptly pointed out in its written opinion:

> "* * * While the ultimate end and object of the Legislature in creating the Authority was to have it operate the turnpike as a toll road, it is wholly illogical to contend that such purpose was the paramount and sole end and object. It is no less a function of the Authority to acquire title to the right of way, to construct the turnpike, to repair and maintain it, than it is to operate the facility, after the acquisition of the right of way and the construction of the turnpike.
>
> "In a very real sense, the Authority was engaged at every step of the way, in the course of its usual trade, business or occupation, from the preliminary surveys, through the acquisition of the right of way, the construction, and the final operation, maintenance and repair of the turnpike. The Legislature has so declared by vesting it with the power and charging it with the responsibility of so doing."

Since both Thorington and the Engineers were engaged in the trade, business or occupation of the Authority, neither was a stranger to the employment and the work. Both, as well as the Authority, were under the canopy of the Workmen's Compensation Act. Consequently, Thorington was not an "other party" within the meaning of Section 65-38 and subject to an action at law for damages for the personal injuries to the Engineer's employee, Anderson. *Sykes v. Stone & Webster Engineering Corp., supra, Rea v. Ford, supra.*

Moreover, under the express terms of Section 65-26, the Authority, the "owner," was liable to Anderson for

workmen's compensation benefits which the owner "would have been liable to pay if the workman had been immediately employed" by it; that is, Anderson was the statutory employee of the "owner" Authority. *Sykes v. Stone & Webster Engineering Corp., supra* (186 Va., at pages 124, 125, 41 S. E. 2d, at page 473).

Similarly, under Section 65-26, the employees of Thorington were the statutory employees of the Authority. Thus the employees of the Engineers, including Anderson, and the employees of Thorington were statutory fellow servants. This being so, Anderson could not maintain an action at law against the negligent servants of Thorington who caused his injury. *Feitig v. Chalkley*, 185 Va. 96, 38 S. E. 2d 73. Neither may Anderson maintain this common-law action against Thorington, the principal of the alleged negligent servants, for this would entitle Thorington to seek indemnity from its negligent employees which would be tantamount to permitting Anderson to sue such negligent employees directly. 42 C. J. S., Indemnity, § 21, pp. 596, 597.

We do not agree with the argument of the plaintiff that although the Authority was vested with the power and responsibility of building the road it did not exercise such power in that it employed no workmen for that purpose. The answer to this argument is that by its express terms Section 65-26 contemplates that the owner may perform or execute work which is a part of his trade, business or occupation through a "subcontractor," as was done here.

Nor do we agree with the plaintiff's contention that because the act creating the Authority provides that it is "created and constituted a political subdivision of the Commonwealth," it is not an "owner" within the meaning of Section 65-26 under our decisions in *Bamber v. City of Norfolk*, 138 Va. 26, 121 S. E. 564; *City of Portsmouth v. Daniels*, 157 Va. 614, 162 S. E. 324; and *Board of Supervisors of Amherst County v. Boaz*, 176 Va. 126, 10 S. E. 2d 498.

In the *Bamber* case we held that the administratrix of a workman employed by a contractor who was erecting a standpipe for the city, and killed in the course of his employment, was not entitled to compensation under Section 20(a) (now § 65-26) in its then form. Under the language of the section as then written, the words "principal contractor" were used where the word "owner" is now found. We there held that "the act does not embrace all employees upon municipal work, but only those employed by the municipality itself and in work which it is the business of the municipality to execute." 138 Va., at page 42.[3]

In the *Daniels* case an employee of an independent contractor while painting a standpipe owned and used by the city as a part of its water system was injured in a fall. We held that the employee was not entitled to compensation from the city under the present language of Section 65-26 which had been amended subsequent to the decision in the *Bamber* case. (Acts of 1924, p. 478.) We said that since Section 65-26 "makes no mention of the State or its political subdivisions or municipal corporations," it is not applicable to them. 157 Va., at page 618.

In the *Boaz* case we held that a carpenter hired by a janitor of a courthouse to repair a window and injured while so doing, was not entitled to compensation from the board of supervisors because he was a casual employee whose employment was not "in the usual course of the trade, business, occupation or profession of the employer" and was expressly excluded by Section 65-25. (176 Va., at page 129.) Moreover, we said, the "expression 'trade, business or occupation'" (*sic*) in Section 65-4 relates "primarily to business operations of persons and private corporations" and was not intended to apply to "political entities." 176 Va., at page 130.

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3. For a clarification of the *Bamber* case in the light of the present language of Section 65-26, see *Sykes v. Stone & Webster Engineering Corp.*, 186 Va. 116, 121, 41 S. E. 2d 469, 471.

Each of these decisions is readily distinguishable from the present case in that at the time of the accident neither the contractor nor his employee was performing any work which was a part of the "trade, business or occupation" of the owner within the meaning of Section 65-26.

But aside from this, the expressed exclusion of the applicability of the Act to political subdivisions should be considered in the light of the particular entities which were there involved, that is, a municipal corporation in the *Bamber* and the *Daniels* cases and a county board of supervisors in the *Boaz* case. To each of these the State has delegated certain functions of local government. In none of these cases were we concerned with the applicability of the Act to a political subdivision such as the Authority which was created for the limited public purpose of constructing, maintaining and operating a turnpike.

We agree with the holding of the lower court that the plaintiff's remedy under the Workmen's Compensation Act excludes his right to maintain the present action at law. Code, § 65-37. Accordingly, the judgment is *affirmed*.

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Monday the 12th day of October, 1959.

Record No. 4986

Thraves Lockett Anderson,
Plaintiff in error,

against

Thorington Construction Company, Incorporated,
Defendant in error.

Upon a writ of error to a judgment rendered by the Law and Equity Court of the City of Richmond on the 16th day of July, 1958.

This day came again the parties, by counsel, and the court having maturely considered the transcript of the record of the judgment aforesaid and arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that there is no error in the judgment complained of. It is therefore adjudged and ordered that the same be, and it is hereby, affirmed, and that the plaintiff in error pay to the defendant in error thirty dollars damages, and also its costs by it expended about its defense herein.

Which is ordered to be certified to the said Law and Equity Court.

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Monday the 30th day of November, 1959.

Thraves Lockett Anderson,
Plaintiff in error,

against

Thorington Construction Company, Incorporated,
Defendant in error.

UPON A PETITION TO REHEAR

On mature consideration of the petition of Thraves Lockett Anderson, plaintiff in error, to set aside the judgment rendered herein, on the 12th day of October, 1959, and grant a rehearing thereof, the prayer of the said petition is denied.